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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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STATE OF UTAH, *et al.*,  
Plaintiffs,

v.

DONALD L. EVANS, *et al.*,  
Defendants,

and

STATE OF NORTH CAROLINA, *et al.*,  
Defendant-Intervenors.

Case No. 2:01-CV-292G

NORTH CAROLINA  
INTERVENORS' MOTION TO  
STRIKE DECLARATION OF  
DR. WOLFSON REGARDING  
DATA ON IMPUTATION

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North Carolina intervenors respectfully move the Court to strike the DECLARATION OF LARA J. WOLFSON, PH.D., REGARDING PLAINTIFFS' ACQUISITION OF DATA ON IMPUTATION IN CENSUS 2000 (hereinafter, "Wolfson Decl. III") which was presented to the Court and parties at the summary judgment hearing on August 29, 2001. The declaration should be struck as untimely and incompetent for the following reasons.

Utah plaintiffs previously filed a supplemental affidavit by Dr. Wolfson as part of their reply/response on July 25, 2001, which attempted to set forth Dr. Wolfson's travails in attempting on her own to obtain imputation data through various governmental sources. That declaration, as noted by North Carolina Intervenor in their Reply Memorandum of August 13, 2001, *see* N.C. Reply at 23 n.10, also was rife with incompetent inadmissible hearsay. For this reason, the earlier declaration did not satisfy the requirements of Fed. R. Civ.P. 56(e), and cannot be considered by the Court. In that declaration, as in the latest declaration, Dr. Wolfson improperly attempted to ascribe thoughts, knowledge, motives and understandings to Utah plaintiffs which were not based on personal knowledge.

At the summary judgment hearing on August 29, 2001, Utah plaintiffs presented an additional declaration by Dr. Wolfson, dated August 28, 2001, which allegedly was meant to respond to the reply memorandum and materials filed by the federal defendants on August 14, 2001. This latest declaration is untimely and incompetent and also may not be considered by the Court.

Dr. Wolfson's latest declaration is essentially a rehash of her earlier declaration, except she goes into more detail about spinning her wheels ineffectually seeking data from all the wrong people. Knowing that the summary judgment hearing was set for August 29<sup>th</sup>, Utah plaintiffs waited until the hearing itself, two weeks after receiving the defendants' briefs and materials, to spring Dr.

Wolfson's declaration on the Court and parties. Although the declaration was signed the day before the hearing, August 28<sup>th</sup>, no effort was made by plaintiffs' counsel to provide copies to defendants on August 28<sup>th</sup>; even the courtesy of providing copies before the commencement of the hearing was omitted. This attempt at trial by ambush should not be condoned.

Although plaintiffs' tardy attempt to pad the record should not be permitted, more importantly the declaration is incompetent under Fed. R. Civ. P. 56(e), and should be struck by the Court. "Rule 56(e) requires that the affidavit be based on personal knowledge, contain facts which would be admissible at trial, and show that the affiant is competent to testify on the matters stated therein." *Conaway v. Smith*, 853 F.2d 789, 792 (10<sup>th</sup> Cir. 1988). *See also El Deeb v. University of Minn.*, 60 F.3d 423, 429 (8<sup>th</sup> Cir. 1995) ("a court may not consider affidavits that do not satisfy the requirements of Fed. R. Civ. P. 56(e)"); *Schosche Indus. v. Visor Gear*, 121 F.3d 675, 681 (Fed. Cir. 1997) (affidavits containing hearsay statements fail to comply with Rule 56(e) requirements that the facts set forth in the affidavit be admissible in evidence and may not be considered by the court).

Dr. Wolfson cannot answer the questions regarding Utah plaintiffs' inexplicable and inexcusable delay in filing their imputation claim which were originally raised by the three-judge panel in *Utah v. Evans I*. As found by that Court, plaintiffs knew about the census bureau's use of imputation from the commencement of their first lawsuit, but failed to explain why discovery was not sought on the issue. *See* N.C. Mem., Exhibit B (Order, 17 April 2001) at 3-6. Even Dr. Wolfson admits that she was told that the data she sought "would have to be made through a discovery request." Wolfson Decl. III, ¶ 17. Indeed, a discovery request in the plaintiffs' second action, the instant case, produced the data which Dr. Wolfson so ineffectually sought through other sources. *See* N.C. Mem., Exhibit G ("Table 3. Persons Imputed to Unclassified Housing Units in the 2000

Census” provided by the federal defendants on June 4, 2001, in response to plaintiffs’ Interrogatory No. 4). What plaintiffs and their counsel have never explained is why such a discovery request was not made in *Evans I* on January 16, 2001, along with their other expedited discovery demands.

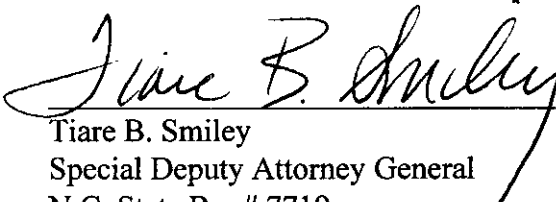
Plaintiffs unsuccessfully attempt to hide behind Dr. Wolfson’s skirts to excuse their failure to pursue their imputation claim in a more timely manner. Dr. Wolfson has no personal knowledge which can excuse plaintiffs’ lack of diligence and her declaration of her own futility is irrelevant.

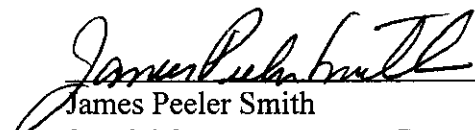
For the foregoing reasons, North Carolina intervenors respectfully urge the Court to strike the untimely and incompetent August 28, 2001, declaration of Dr. Wolfson.

This the 5<sup>th</sup> day of September, 2001.

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### CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **North Carolina Intervenor's Motion to Strike Declaration of Dr. Wolfson Regarding Data on Imputation** has been served by Federal Express, Priority Overnight delivery, next business day, addressed as follows:

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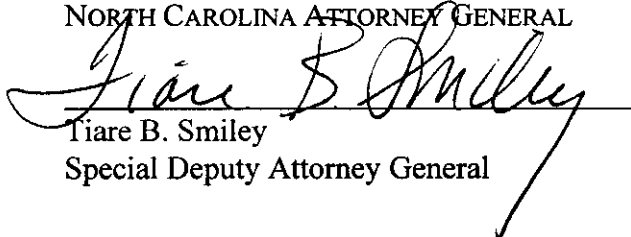
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This the 5<sup>th</sup> day of September, 2001.

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